THE SUPREME COURT OF THE UNITED STATES
OCTOBER 1993 - TERM

(1)

Supreme Court, U.S.
FILED

ANNETTE GORE,

93-1034 DEC 28 1993

PETITIONER

VS. NO. _____

BRUCE BABBITT, SECRETARY OF THE INTERIOR, UNITED STATES ~~OF AMERICA, JOHN T. MONCRAVIE,~~ JR., MARY KATHRYN MONCRAVIE LEWIS, FIRST NATIONAL BANK OF BERRYVILLE, ARKANSAS, CLEMENTINE S. MONCRAVIE, and CHRIS ALEC MONCRAVIE,

DEFENDANTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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94 pp

1. QUESTIONS PRESENTED FOR REVIEW

I. Does the Tenth Circuit Court of Appeals Rule 36.3 on unpublished opinions as applied to the Petitioner (and similar rules of all other Circuit Courts) constitutes a denial of the equal protection of the law granted by the 5th Amendment of the United States Constitution, because it contains no objective standard to determine when a Court decision has no precedential value for future litigants and so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

II. Does the Tenth Circuit Court of Appeal's failure to follow any recognized rule in construing the Section 5 of the Act of October 21, 1978, P.L. No. 95-496,

92 Stat., 1660, 1661 amending Sec. 8 of the Act of April 18, 1912, 37 Stat., 86, 88, constituted a denial of due process of law to the Petitioner under the 5th Amendment of the Constitution, and thus so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

2. LIST OF PARTIES

All parties appear in the caption.

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4. REFERENCE TO ALL OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS, JUDGMENTS, AND ORDERS IN THE CASE:

There are no official or unofficial reports of opinions, orders or judgments and decisions in the case except those entered by the courts and administrative agencies as listed below and which appear in the appendix verbatim.

1. Order of the Tenth Circuit Court of Appeals denying Petitioners rehearing filed September 29, 1993, and Order and Judgment filed August 31, 1993.

2. Order and Judgment of the United States District Court for the Northern District of Oklahoma, entered on the docket April 1, 1993.

3. Decision by the United States Department of the Interior dated December 4, 1991.

4. Order of the Superintendent of the Osage Indian Agency dated October 4, 1989 denying will to probate.

5. JURISDICTION OF THIS COURT

The date of the Order and Judgment to be reviewed was filed with the Clerk of the Tenth Circuit Court of Appeals on August 31, 1993. The Order Denying Petitioner's Petition for Rehearing was filed September 29, 1993. The jurisdiction of this Court is believed to be vested to review the said Order and Judgment by 28 USC. Sec. 1254(1).

6. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE ARE VERBATIM AS FOLLOWS:

5TH AMENDMENT TO THE U.S. CONSTITUTION:

> "No person shall be held to answer for a capital, or otherwise infamous crime,unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia,when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against

himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

SECTION 8. ACT OF CONGRESS OF APRIL 18, 1912; 37 STAT. 86, 88:

"That any adult member of the Osage Tribe of Indians not mentally incompetent may dispose of any or all of his estate, real, personal, or mixed, including trust funds, from which restrictions as to alienation have not been removed, by will in accordance with the laws of the State of Oklahoma: Provided, That no such will shall be admitted to probate or have any validity unless approved before or after the death of the testator by the Secretary of the Interior."

SECTION 5. ACT OF CONGRESS OF OCTOBER 21, 1978, AMENDING SECTION 8 OF ACT OF APRIL 18, 1912; 92 STAT. 1660, 1661:

"Section 8 of the Act of April 18, 1912 (37 Stat. 86, 88), is hereby amended to read as follows: 'Any person of Osage Indian blood, eighteen years of age or older may dispose of his Osage headright or mineral interest and the remainder of his estate (real, personal, and mixed, including trust funds) from

which restrictions against alienation have not been removed by will executed in accordance with the laws of the State of Oklahoma: Provided, That the will of an Osage Indian shall not be admitted to probate or have any validity unless approved after the death of the testator by the Secretary of the Interior. The Secretary shall conduct a hearing as to the validity of such will at the Osage Indian Agency in Pawhuska, Oklahoma. Notice of such hearing shall be given by publication at least ten days before the hearing in a newspaper of general circulation in Osage County, Oklahoma, and by mailing notice of such hearing to the last known address of all known heirs, legatees, and devisees. The cost of publication shall be borne by the estate. The rules of evidence of the State of Oklahoma shall govern the admissibility of evidence at such hearing. All evidence relative to the validity of the will of an Osage Indian shall be submitted to the Secretary within one hundred and twenty days after the date of the petition for approval of such will is filed with the Secretary, unless for good cause shown the Secretary extends the time: Provided, That such time shall not be extended beyond six months from the date of the first hearing. For purposes of determining the validity of any will, the Secretary is hereby granted the subpoena power as is vested in the courts. All cost of obtaining witnesses and evidence before the Secretary shall be borne by the party

producing such witnesses or evidence, subject to such costs being taxed to the estate in the event that the District Court of the State of Oklahoma having jurisdiction should determine such costs beneficial to the whole estate. Not withstanding any appeal from the decision of the Secretary, approval of such will by the Secretary shall entitle it to be admitted to probate without further evidence as to its validity or, upon disapproval thereof, the heirs may immediately petition for letters of administration in the district court. No appeal from the order of the Secretary approving or disapproving any will shall stay the issuance of letters testamentary or of administration: Provided, That such letters shall not confer power to sell any restricted assets by virtue of any provision in such will, pay or satisfy legacies, or distribute property of the decedent to the heirs or beneficiaries until the final determination of the appeal, but all other action taken by the district court pending said appeal shall be valid and binding. No court except a Federal court shall have jurisdiction to hear a contest of a probate of a will that has been approved by the Secretary. Such appeals shall be on the record made before the Secretary and his decisions shall be binding and shall not be reversed unless the same is against the clear weight of the evidence or erroneous in law'."

10TH CIRCUIT COURT OF APPEALS RULE 36.3:

> "Unpublished opinions and orders and judgments of this court have no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. A dissent from this rule by Circuit Judges Holloway, Barrett, and Baldock, appears at 955 F.2d 36. (Adopted effective January 1, 1993.)"

TITLE 84, O.S., SECTION 55.

> Every will, other than a nuncupative will, must be in writing; and every will, other than a holographic will and a nuncupative will, must be executed and attested as follows:
>
> 1. It must be subscribed at the end thereof by the testator himself, or some person, in his presence and by his direction, must subscribe his name thereto.
>
> 2. The subscription must be made in the presence of the attesting witnesses, or be acknowledged by the testator to them, to have been made by him or by his authority.
>
> 3. The testator must, at the time of subscribing or acknowledging the same, declare to the attesting witnesses that the instrument is his will.

4. There must be two attesting witnesses, each of whom must sign his name as a witness at the end of the will at the testator's request and in his presence.

5. Every will, other than a holographic and a nuncupative will, and every codicil to such will or to a holographic will may, at the time of execution or at any subsequent date during the lifetimes of the testator and the witnesses, be made self-proved, and the testimony of the witnesses in the probate thereof may be made unnecessary by the acknowledgement thereof by the testator and the affidavits of the attesting witnesses, each made before an officer authorized to take acknowledgements to deeds of conveyance and to administer oaths under the laws of this state, such acknowledgements and affidavits being evidenced by the certificate, with official seal affixed, of such officer attached or annexed to such testamentary instrument in form and contents substantially as follows:

THE STATE OF OKLAHOMA

COUNTY OF _____

Before me, the undersigned authority, on this day personally appeared _____ _____, _____, and _____ _____, known to me to be the testator and the witnesses, respectively, whose names are subscribed to the annexed or

foregoing instrument in their respective capacities, and, all of said persons being by me first duly sworn, said _____, testator, declared to me and to the said witnesses in my presence that said instrument is his last will and testament or a codicil to his last will and testament, and that he had willingly made and executed it as his free and voluntary act and deed for the purposes therein expresses; and the said witnesses, each on his oath stated to me, in the presence and hearing of the said testator, that the said testator had declared to them that said instrument is his last will and testament or codicil to his last will and testament, and that he executed same as such and wanted each of them to sign it as a witness; and upon their oaths each witness stated further that they did sign the same as witnesses in the presence of the said testator and at his request and that said testator was at that time eighteen (18) years of age or over and was of sound mind.

_____
Testator

_____
Witness

_____
Witness

Subscribed and acknowledged before me by the said _____, testator, and subscribed and sworn before me by the said _____, and _____ __, witnesses, this _____ day of ___ _____, A.D., _____.

(SEAL)
(SIGNED) _____
(OFFICIAL CAPACITY OF OFFICER)

A self-proved testamentary instrument shall be admitted to probate without the testimony of any subscribing witness, unless contested, but otherwise it shall be treated no differently than a will or codicil not self-proved. Furthermore, a self-proved testamentary instrument may be revoked or amended by a codicil in exactly the same fashion as a will or codicil not self-proved and such a testamentary instrument may be contested as a will not self-proved. R.L.1910, Section 8348. Laws 1961, p. 636, Section 1, eff. May 17, 1961; Laws 1965 c. 11, Section 1, eff. Feb. 10, 1965; Laws 1976, c. 46, Section 1; Laws 1977, c. 58, Section 1.

TITLE 84, O.S., SECTION 71:

A will, or a revocation thereof, made out of this state by a person not having his domicile in this state; is as valid when executed according to

the law of the place in which the same was made, or in which the testator was at the time domiciled, as if it were made in this state, and according to the provisions of this article.
R.L.1910, Section 8351.

7. STATEMENT OF THE CASE

Jurisdiction in the trial court, United States District Court for the Northern District of Oklahoma, was vested under Title 5 U.S.C. Section 701-706 and Title 28 U.S.C. Section 1331.

Myrtle C. Moncravie, Deceased, was Osage Allottee No. 917, owning 1.16666 Osage Indian headrights. She left surviving her the Petitioner, Annette Gore, and four grandchildren of a deceased son. She left the will in question, executed according to Arkansas law, giving her headright interest to her two grandchildren, Mary Kathryn Moncravie Lewis and John T. Moncravie, Jr. Petitioner challenged the validity of the will of the deceased in the hearing for approval of said will before the Department of the Interior. The Department found the said will was not

executed in accordance with the laws of the State of Oklahoma and disapproved the will. On appeal, the Secretary of the Interior reversed, holding that as the will was validly executed under Arkansas law, it was entitled to be approved under Title 84 O.S., Section 71, that authorized probate of a will in Oklahoma when the same was valid under laws of the state where executed. Petitioner appealed to the U.S. District Court for the Northern District of Oklahoma who affirmed the Secretary's decision and Petitioner appealed to the Tenth Circuit, who in an unpublished opinion, affirmed the District Court.

This case involves the construction of Section 5 by the Act of Congress of October 21, 1978, 92 Stat., 1660, 1661, amending Sec. 8, of the Act of Congress of April 18, 1912, 37 Stat. 86, 88. The 1912

Act authorized Osage Indians to dispose of their headright interest by will "in accordance with the laws of the State of Oklahoma". (37 Stat. 88). Among those laws of Oklahoma in force at that time were what is now Sections 1 thru 4 of Title 84, O.S., Sec. 55, setting forth the requirements for the execution of a will by residents of Oklahoma and Title 84 O.S. Section 71, validating wills of non-residents if valid in accordance with the laws of the state of domicile or where the will was made. In 1978 Congress substantially amended Section 8 and part of the amendment was authorizing Osage Indians to dispose of their headright interest "by will executed in accordance with the laws of the State of Oklahoma" and established new procedures for approval of the same. The Tenth Circuit Court of Appeals construed the Act as

though no amendment had been made to it; it did not apply any settled rules of construction in construing the amendment made by Congress in the 1978 Act and ignored the change made by Congress by inserting the word "executed". Although this Act of Congress, as amended had never been construed by the Court before, the Tenth Circuit issued its Order and Judgment in the case pursuant to its rule 36.3, that decision had no precedential value for future litigants and was not to be published. The Tenth Circuit has no objective standard to determine which cases have precedential value and which ones do not, but leaves the determination of such issues to a subjective basis of the Judge or panel with its attendant dangers of arbitrariness and capriciousness. Such Rules of law dependent on a subjective basis for their

application have been uniformly held by this Court to be unconstitutional as a violation of the equal protection laws as unduly vague.

Each one of the Circuit Courts of Appeals have rules similar to those of the Tenth Circuit relating to what decisions shall be published as having precedential value and what shall not. A determination of the question of the constitutionality of these rules affect the entire administration of justice in all Court of Appeals and merits this Court's review as to the constitutionality of such rules.

ARGUMENT

I

The Tenth Circuit Court of Appeals Rule 36.3 as applied to the Petitioner constitutes a denial of equal protection laws guaranteed by the 5th Amendment of the United States Constitution as it contains no objective standards for determining which opinions and decisions should have precedential value and which

opinions and decisions should not be published.

The Tenth Circuit Court of Appeals rule 36.3 states:

"Citations of Unpublished Opinions/ Orders and Judgments. Unpublished opinions and orders and judgments of this court have no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata or collateral estoppel. A dissent from this rule by Circuit Judges Holloway, Barrett and Baldock appears at 955 F.2d 36."

Chief Judge Holloway, the author of the dissent, raised the issue of unconstitutionality of the rule on page 37 of his dissent. He states:

"The most important reasons for permitting citations of published precedents are just as cogent to me in the case of unpublished rulings. Each ruling, published or unpublished, involves the fact of a particular case and the application of law to the case. Therefore, all rulings of this Court are precedents, like it or not, and we cannot consign any of them to oblivion by merely banning their citation. See Jones vs. Superintendent, Virginia State Farm, 465 F2d 1091, 1094 (4th Cir. 1972), ("... Any decision is by

definition a precedent...")

"No matter how insignificant a prior ruling might appear to us, any litigant who can point to a prior decision of this Court and demonstrate that he is entitled to prevail under it should be able to do so as a matter of essential justice and fundamental fairness. To deny a litigant this right may well have overtones of constitutional infringement because of arbitrariness, irrationality and unequal treatment of the rule."

Judge Holloway reveals the application of the rule is made by the court on a subjective basis: He states on page 38 of his dissent:

"Furthermore, when we make our ad hoc determination that a ruling is not significant enough for publication, we are not in as informed a position as we might believe. Future developments may well reveal that the ruling is significant indeed. As we know, we are frequently changing our views on publication of decisions, deciding later to publish them on motions of the parties or on our own motion. The classifications are too fine in many instances and we cannot confidently say, in deciding whether to publish, that we are not working an injustice on parties in later cases." (emphasis added)

There is no objective standard

by which the Court makes its determination of which rulings are to have precedential value to be published. As such, the application of the rule depends on subjective basis of the panel or the Judge who is making the decision. This Court, in the case of Grayned vs. City of Rockford, 408 U.S., 104, 108 33 LE2d, 222, 92 S Ct. 2294, question the validity of the ordinances of the City of Rockford, Illinois because of the vagueness. This court stated on page 108, 109:

> "Second,if arbitrary and discrimitory enforcement is to be prevented,laws must provide explicit standards for those who apply them. A vague law impermissibly delegates policy matter matters to policemen, judges and jurors for resolution on an ad hoc and subjective basis, with the attendant dangers arbitrary and discriminatory application."

The Tenth Circuit in applying Rule 36.3 makes ad hoc determinations that a ruling is not significant enough for

publication. Holloway, Dissent p. 38, supra

> This Court said in Interstate Circuit v. Dallas, 390 U.S. 676, 684, 88 S. Ct. 1298 20 L Ed2d, 225, 232:
>
> "In short, as Justice Frankfurter said, 'legislation must not be so vague, the language so loose, as to leave to those who have to apply it too wide a discretion', and 'vague standards, unless narrowed by interpretation encourage erratic administration whether the censor be administrative or judicial; individual impressions become the yardstick of action, and result in regulation in accordance with the beliefs of the individual censor rather than regulation by law'."

In Giaccia v. Pennsylvania, 382 U.S. 399, 402-03 U.S. 15 L Ed2d 447, 450, 86 S. Ct. 518; this Court stated:

"It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case.

There is no distinctive standard by

which the 10th Circuit determines what is precedentially significant enough to be published. This is not an isolated matter with the Tenth Circuit, but is a problem present throughout all of the Circuits and has generated a flood of law review articles.

In UNREPORTED DECISIONS OF THE UNITED STATES COURTS OF APPEALS, 63 CORNELL LAW REVIEW, 128-148, The author raises the issue that the no citation rule of un-published decisions

> "may deny litigants due process of law as it nullifies stare decisis, which is "fundamental to our scheme of ordered liberty".

In "A SNAKE IN THE PATH OF THE LAW: THE SEVENTH CIRCUIT'S NON-PUBLICATION RULE 39 University of Pittsburg Law Review, 309-340, the author concludes the 7th Circuit had failed in the application of its "no publish rule" to distinguish between the

trivial and the important cases and failure can dangerously erode the basic structure of our system of law.

In "THE NON-PRECEDENTIAL PRECEDENT - LIMITED PUBLICATION AND NO CITATION RULES in the UNITED STATES COURTS OF APPEAL." 78 Columbia Law Review, 1167-1206, the author on page 1192, states:

> "A good deal of evidence suggests that these suspicions (the judge's inability to correctly distinguish between disputes settling issues and lawmaking issues) are well-founded, i.e. that many lawmaking opinions are in fact going unpublished";

and the author supports his statement with numerous incidences from the Fourth Circuit, the Fifth Circuit, the Seventh Circuit, and Ninth Circuits and refers to same the problem reviewed in California decisions in, "The Unpublished Appellant Opinion: Friend or Foe", 48, Cal. BJ 386. The author's conclusion is that there is a great inconsistency in determining whether

a case is to be published or not.

In "NINTH CIRCUIT UNPUBLISHED OPINIONS: DENIAL OF EQUAL JUSTICE, 61, American Bar Association Journal: 224 -227", the author points out inconsistencies in ruling on same fact cases of unpublished and published opinions; and he argues decisions of first impression should be precedent, but many such cases are not being published. He concludes:

> "But the present approach has created abuses that threaten our most fundamental precepts of principled adjudications and equal justice. If these and similar abuses are allowed to fester, one doubts that the defense of 'administrative convention' will be allowed as a place in bar to this judgment of future generations."

The issue before the Tenth Circuit in the case at bar is one of first impression. There were no decisions construing Section 5 of the Act of

Congress of October 21, 1978. Even though it is a case of first impression, the court, under its rule 36.3, held it was of no precedential value to be published. When is a case of first impression of no precedential value? The fact a case is a first impression case alone should establish it as of precedential value. It is unfair and a denial of equal protection of the law to Petitioner for the construction of the Act of Congress in the first instance to be unpublished and without precedential value. A party in the future in the same position as the Petitioner can make the same challenge to this amendment and come out with a different outcome as this decision has no precedential value. This is not equal protection of the law.

As this problem is not limited to the 10th Circuit as reflected in this law

review article above, it has significance in and throughout the administration of justice in all circuits and merits attention of this court. We submit Tenth Circuit Rule 36.3 is unduly vague and constitutionally void and its application has denied petitioner equal protection of the law.

II.

Did the 10th Circuit Court of Appeals' failure to follow any recognized rules of construction of Section 5 of the Act of Congress of October 21, 1978, 92 Stat. 1660, 1661, amending Section 8 of the Act of Congress of April 18, 1912, 37 Stat. 86, 88, constituted a denial of equal protection of the law and due process of law to the petitioner guaranteed by the 5th Amendment of the Constitution?

In construing said Section 5 of the Act of Congress, the court relied on no rules of construction and ignored the rules of construction adopted by this court in the following cases: Brewster vs. Gage, 280 U.S., 327, 337, 50 S. Ct.

115, 74 LEd. 457:

> "The deliberate selection of language so different from that used in the earlier acts indicates that a change of law was intended."

Colony Company vs. Commissioner of Internal Revenue, 284 U.S. 552, 560, 52, S. Ct. 211, 76 LEd 484, 489:

> "The rule which should be applied is established by many decisions. The legislature must be presumed to use the words in their known and ordinary significance."

Washington Marker Company vs. Hoffman, 101 U.S. 112, 115, 25 LEd 782, 783:

> "It is a cardinal rule of statutory construction that significance and effect should, if possible, be accorded to every word. As early as Bacon's Abridgment, Section 2, it was said that `a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence or word shall be superfluous, void or insignificant'."

ExParte: In the Matter of the Public National Bank of New York, 278 U.S. 101, 104, 49 S. Ct. 211, 73 LEd 202, 203:

> "No rule of statutory construction

> has been more definitely stated or more oftenly repeated than the cardinal rule that 'significance and effect shall, if possible, be accorded to every word'."

The Tenth Circuit ignored the rule it acknowledged in In Re. Dederick 91 F2d, 646, 648:

> "and it is not presumed that the Legislature used a meaningless word."

The Tenth Circuit Court paid no attention to any rule of construction and "read out" of the statute the word "executed" contrary to the above set of rules. The court construed Section 8 as amended as though it had never been amended, and thus attributes to Congress, contrary to the above rules, that it had no purpose in adopting this amendment and did a vain and useless act by adopting it. There can be no equal justice under the law when rules of the construction of the statute of the court are applied in one situation and not in a similar situation.

Stare decisis was recognized by Justice Frankfurter in the case of Heverling vs. Haddock, 309 U.S. 106, 119, 60 S. Ct. 444, 84 LEd 604, 612:

> "We recognize that stare decisis embodies an important social policy. It represents an element of continuity in law and is rooted in the psychologic need to satisfy reasonable expectations."

Justice Douglas, in an article in 49 Columbia Law Review, 735, 736 entitled, "Stare Decisis", said:

> "There will be no equal justice under law if a negligence rule is applied in the morning but not in the afternoon. **Stare Decisis** provides some moorings so that men may trade and arrange their affairs with confidence. **Stare Decisis** serves to take the capricious element out of law and to give stability to society."

The author of The Law Review article in 63 Cornell Law Review 128, states:

> "Stare Decisis is fundamental to all scheme of ordered liberty."

Petitioner therefore submits the

failure of the Tenth Circuit Court of Appeals to apply settled rules of construction to the Act of Congress in question is a denial of petitioners equal protection of laws guaranteed to her under the 5th Amendment of the Constitution and decision should be reversed.

Respectfully submitted,

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ANNETTE GORE

APPENDIX

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Order and Judgment of U.S. District Court, N.D. Okl.....page 10-15

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UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

IN THE MATTER OF THE WILL OF MYRTLE C. MONCRAVIE, OSAGE ALLOTTEE NO. 917, Deceased, and ANNETTE GORE,	)	
Plaintiff - Appellant	)	
v.	)	No. 93-5092
MANUEL LUJAN, JOHN T. MONCRAVIE, JR., MARY KATHRYN MONCRAVIE LEWIS, FIRST NATIONAL BANK OF BERRYVILLE, ARKANSAS, CLEMENTINE S. MONCRAVIE, and CHRIS ALEC MONCRAVIE,	)	
Defendants - Appellees.	)	

ORDER

Filed September 29, 1993

Before McKAY, Chief Judge, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL and KELLY, Circuit Judges.

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Fed·

eral Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

Entered for the Court

ROBERT L. HOECKER, Clerk

/s/ Patrick Fisher

By: _____
Patrick Fisher,
Chief Deputy Clerk

RECEIVED SEP O 2 1993

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

IN THE MATTER OF THE WILL OF MYRTLE C. MONCRAVIE, OSAGE ALLOTTEE NO. 917, Deceased, and ANNETTE GORE,	)	
Plaintiff-Appellant	)	
v.	)	No. 93-5092
	)	(D.C. No.92-C-13-E)
	)	(N.D. Oklahoma)
MANUEL LUJAN, JOHN T. MONCRAVIE, JR., MARY KATHRYN MONCRAVIE LEWIS, FIRST NATIONAL BANK OF BERRYVILLE, AR- KANSAS, CLEMENTINE S. MONCRAVIE, and CHRIS ALEC MONCRAVIE,	)	
Defendants-Appellees.	)	

ORDER AND JUDGMENT*

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* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrine of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

Before LOGAN, MOORE and BRORBY, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously to honor the parties request for a decision on the briefs without oral argument. See Fed.R. App. P. 34(f); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Plaintiff Annette Gore appeals from a decision of the district court affirming the validation of her mother's will by the Regional Solicitor of the Department of

the Interior. "Because the relevant facts are undisputed and we consider only legal issues, our review is plenary." Jim Walter Homes, Inc. v. Spear (In re Thompson), 894 F.2d 1227, 1228 (10th Cir. 1990).

Decedent Myrtle C. Moncravie, plaintiff's mother and a resident of Arkansas, executed a will in Arkansas distributing her headright interest as an original Osage Indian allottee to two children of her deceased son but expressly excluding plaintiff. Plaintiff argues that her mother's will was not executed "in accordance with" Oklahoma law and therefore is invalid. The distribution of Osage Indian headrights by will is governed by Section 8 of the Act of April 18, 1912, ch. 83, 37 Stat. 86, 88, Pub. L. No. 125, as amended by Section 5(a) of the

Act of October 21, 1978, Pub. L. No. 95-496, 92 Stat. 1660, 1661. It provides:

> Any person of Osage Indian blood, eighteen years of age or older, may dispose of his Osage headright or mineral interest and the remainder of his estate (real, person, and mixed, including trust funds) from which restrictions against alienation have not been removed by will executed in accordance with the laws of the State of Oklahoma.

Plaintiff does not contest on appeal that decedent's will was executed in conformity with the laws of Arkansas, but argues that decedent did not make a sufficient declaration to the witnesses that she was executing a will to establish its validity under Oklahoma law, citing Price v. Price, 479 P.2d 952 (Okla. 1971). Although defendants attempt to distinguish

Price and rely on other Oklahoma cases to support their position, they rely principally, as did the Regional Solicitor and the district court, on Okla. Stat. tit. 84, § 71, which provides as follows:

> A will, or a revocation thereof, made out of this state by a person not having his domicile in this state;is as valid when executed according to the law of the place in which the same was made, or in which the testator was at the time domiciled, as if it were made in this state, and according to the provisions of this article.

We agree that the operation of the federal statute and § 71, read together, unambiguously validates decedent's will. That will, validly executed in Arkansas, is also valid "as if it were made in [Oklahama]." It is thus executed "in accordance with the laws of the State of Oklahama," and we need not consider the

defendants' other arguments.

AFFIRMED.

Entered for the Court

James K. Logan
Circuit Judge

IN THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN
DISTRICT OF OKLAHOMA

IN THE MATTER OF THE WILL OF MYRTLE C. MONCRAVIE, OSAGE ALLOTTEE No. 917, Deceased,	)	
ANNETTE GORE,	)	
Complainant,	)	No. 92-C-13-E
vs .	)	
MANUEL LUJAN; JOHN T. MONCRAVIE, JR.; MARY KATHRYN MONCRAVIE LEWIS; FIRST NATIONAL BANK OF BERRYVILLE, ARKANSAS; CLEMENTINE S. MONCRAVIE; and CHRIS ALEC MONCRAVIE;	)	
Defendants.	)	

ORDER AND JUDGMENT

COMES NOW BEFORE THE COURT for consideration the appeal of Annette Gore from the decision of the Regional Solicitor reversing the validation of the Will of the Decedent by the Superintendent of the

Osage Indian Agency. Complainant seeks reversal of the decision of the Regional Solicitor, and an Order invalidating the Will of the Decedent. Defendants have requested oral arguments, however, the Court finds that the briefs and the file herein are sufficient for appropriate resolution of this matter. For the reasons stated herein, the Court finds the Decedent's Will to be valid and affirms the decision of the Regional Solicitor.

Myrtle Moncravie, while domiciled in the State of Arkansas, executed a Will, dated November 3, 1987, in accordance with the laws of the State of Arkansas. The Will purports to distribute the Decedent's 1.16666 Osage Indian headright interest proportionately to two of her grandchildren, Mary Kathryn Moncravie Lewis and

John T. Moncravie, Jr. Jurisdiction is vested in this Court by virtue of 5 U.S.C. §701, et seq.; 28 U.S.C. §1331; Section 8 of the Act of Congress of April 18, 1912, 37 Stat. 86, 88, as amended by Section 5(a) of the Act of October 21, 1978, 92 Stat. 1660-61 and the Osage Tribe of Indians Technical Correction Act of 1984, 98 Stat. 3163 and the Regulations of the Secretary of the Interior, 25 C.F.R. §17.1, 17.14.

The distribution of Osage Indian headright by will is governed by Section 8 of the Act of Congress of April 18, 1912, 37 Stat. 86, 88, as amended by Section 5(a) of the Act of October 21, 1978, 92 Stat. 1660-61, which provides in pertinent part:

> Any person of Osage Indian blood, eighteen years of age or older, may dispose of his Osage

> headright or mineral interest and the remainder of his estate (real, person, and mixed, including trust funds) from which restrictions against alienation have not been removed by will executed in accordance with the laws of the State of Oklahoma....

The question presented to this Court is whether the will in question, which was executed according to the requirements and laws of Arkansas and which purports to dispose of an Osage Indian headright interest, was "executed in accordance with the laws of the State of Oklahoma" as contemplated by the above Act of Congress. Because no legislative history exists to give insight to the Congressional intent, this Court must construe the Act in question in accordance with its plain meaning. This Court finds the plain meaning of the Statute to be clear. The

will in question must have been executed in accordance with the laws of the State of Oklahoma. The Decedent's Will was executed in accordance with 84 O.S.§71:

> A will...made out of this State by a person not having domicile in this State is valid when executed according to the law of the place in which the same was made, or in which the testator was at the time domiciled, as if it were made in this state, and according to the provisions of this Article.

The Court accordingly finds that the Decedent's will was executed "in accordance with the laws of the State of Oklahoma", as contemplated by the Act of Congress, supra..

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the decision of the Regional Solicitor, and the Department of the Interior, validating the Will of Myrtle Moncravie is hereby affirmed. Accordingly

Annette Gore's complaint is hereby dismissed on the merits.

ORDERED this 30th day of March, 1993.

/s/ James O. Ellison

JAMES O.ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
REGIONAL OFFICE, SOUTHWEST REGION
P.O. BOX 3156
TULSA, OKLAHOMA 74101

REFERENCE NO. BIA. SW . 2512

In the Matter of the Will of MYRTLE C. MONCRAVIE, Osage Allottee No. 917, Deceased	)	Appeal from Order of the Superintendent of the Osage Agency, Bureau of Indian Affairs, Case No. IA-T-51

DECISION ON APPEAL FROM
SUPERINTENDENT'S ORDER
DISAPPROVING WILL

Myrtle C. Moncravie, Osage Indian Allottee No. 917, died testate on June 5, 1988, at the age of 92. At the time of her death she was domiciled in Eureka Springs, Carroll County, Arkansas, and she owned a 1.16666 Osage headright interest subject to the jurisdiction of the Secretary of the Interior. Prior to her death, she

executed a will on November 3, 1987, in Berryville, Arkansas.

On November 18, 1988, and February 22, 1989, William E. Haney, acting as the Special Attorney for the Osage Indians under 25 C.F.R. § 17.1(d), conducted hearings of record on behalf of the Secretary, as to the validity of the will of Myrtle C. Moncravie, in accordance with Section 8 of the Act of April 18, 1912, 37 Stat. 86, 88, as amended by Section 5(a) of the Act of October 21, 1978, 92 Stat. 1660, 1661, the Osage Tribe of Indians Technical Corrections Act of 1984, Act of October 30, 1984, 98 Stat. 3163, and regulations published by the Secretary of the Interior at 25 C.F.R. §§ 17.1-17.14.

At the hearing on November 18, 1988, the Testatrix's grandson, John T.Moncravie,

Jr.; granddaughter, Mary Kathryn Moncravie Lewis; and the named executor, the First National Bank of Berryville, Arkansas ("the Bank"), appeared through counsel and placed into evidence a certified copy of the Testatrix's will executed on November 3, 1987, and a certified copy of a revocable trust document executed by the Testatrix on August 25, 1987. Under the 1987 Will, Mrs. Moncravie bequeathed to John Moncravie, Jr. and Mary Kathryn Lewis each one-half of her Osage headright interest and she directed that the rest of her estate go into the trust in which she named John T. Moncravie, Jr., Mary Kathryn Lewis, Clementine S. Moncravie and Chris Alec Moncravie, all children of the Testatrix's deceased son, John Moncravie, Sr., as equal beneficiaries. The trust

document specifically excluded Annette Gore. The Bank was named as Trustee. Annette Gore, the daughter of the Testatrix, appeared and objected to the approval of the will on the grounds that the Testatrix executed the will while under undue influence and insane delusion. She later amended her objection to include allegations that the Testatrix did not sufficiently publish the will and failed to meet the requisite requirements of law for subscription of wills. At the hearing Mrs. Gore placed into evidence a copy of a will purportedly executed by Myrtle C. Moncravie dated July 8, 1987, bequeathing Annette Gore 1/2 interest in the head-rights and John T. Moncravie, Jr., Mary Kathryn Lewis, Clementine S. Moncravie and Chris Alec Moncravie a 1/8 interest each

in the headrights. Annette Gore was named as executrix of the July 8, 1987, will. Mrs, Gore also obtained admission of copies of documents purportedly executed by Myrtle C. Moncravie which included a will dated August 7, 1984; a power of attorney in favor of Mrs. Gore on July 8, 1987; and a revocation of power of attorney executed on August 10, 1987.

After the February 22, 1989, hearing in conformity wlth 25 C.F.R. § 17.10, the Acting Field Solicitor transmitted the record of the hearings to the Superintendent of the Osage Agency by memorandum dated September 29, 1989, along wlth the recommendation of the Special Attorney to disapprove the will for probate. After a review of the record of the hearing and the recommendation of the

Special Attorney in accordance with 25 C.F.R. § 17.12, Jack Shoemate, Superintendent, Osage Agency, BIA issued an order disapprovlng the will on October 4, 1989. The Superintendent based his decision on six Findings of Fact and four Conclusions of Law. John Moncravie, Jr., Mary Kathryn Lewis, and the Bank appeal the fourth conclusion of law which stated:

> 4. THAT the will dated November 3, 1987, does not meet the requirements of the laws of the State of Oklahoma for a valid will for the reason that the statement "if this is the way you want it and you are satisfied with it, now is the time to sign it," coupled with the "Testatrix straightening up like she was ready to sign" does not constitute a sufficient declaration by testatrix to the witnesses that the instrument being signed was her will.

Appellants state that Mrs. Gore did not raise the issue of insufficient publi-

cation and deficient subscription until the day before the hearing even though the regulations clearly provide that persons contesting a will must state the grounds of their objections in writing no less than five days before the hearing. 25 C.F.R. § 17.3(b). Congress has permitted testamentary disposal of restricted property by members of the Osage Tribe only where the will is "executed in accordance with the laws of the state of Oklahoma." Section 5(a) of the Act of October 21, 1978, 92 Stat. 1660, 1661. No will is to be admitted to probate or have any validity unless approved by the Secretary of the Interior after a hearing on its validity. Id. The Secretary's inquiry into the execution of the subject will is mandated by the statute regardless

of whether or not the issue is raised by a party to the case.

Mrs. Gore also filed a notice of intent to appeal, alleging error in the second and third conclusions of law:

> 2. THAT the evidence shows that, at the time of the execution of the will, Testatrix possessed testamentary capacity, as defined by the laws of the State of Oklahoma, in that she knew, in a general way, the character and extent of her property, understood her relationship to the objects of her bounty and those who ought to be in her mind at the time she made her will; and comprehended the nature and effect of her testamentary act;
>
> 3. THAT there is no evidence that the will was executed as a result of menace, fraud, duress, coercion, or undue influence being exerted upon the Testatrix.

The secretary will examine each of these issues and will overturn the Superin-

tendent's decision only if it against the clear weight of the evidence or erroneous in law. See the Act of October 21, 1978, Section 5(a), 92 Stat. 1660, 1662; Akers v. Hodel, No. 86-2898 (10th Cir., March 24, 1989).

FACTUAL BACKGROUND

Myrtle C. Moncravle, Osage Allottee No. 917, died on June 5, 1988,in Fayetteville, Arkansas. At the time of her death she was a resident of Eureka Springs, Carroll County, Arkansas. She was survived by her daughter, Annette Moncravie Gore, and five grandchildren: John T. Moncravie, Jr., Mary Kathryn Moncravie Lewis, Clementine S. Moncravie and Chris Alec Moncravie, all chlldren of the Testatrix's deceased son, John Moncravie, Sr., and Tina Roaine Allen, daughter of Annette Gore.

For a number of years prior to July 1987, Mrs. Moncravie lived with her son, John T. Moncravie, Sr., in her home in Eureka Springs, and Mr. Moncravie handled his mother's financial matters. Prior to death of John Moncravie, Sr., on July 1, 1987, Mrs. Moncravie executed a will dated August 7, 1984, a copy of which was submitted into evidence at the probate hearing. According to the terms of the 1984 will, Mrs. Moncravie directed that her son John Moncravie, Sr., receive 7/12 of her Osage headright, and that her daughter, Annette Gore, receive a life estate in the other 7/12 Osage headright with the remainder to go to Mrs. Moncravie's granddaughter, Mary Kathryn Moncravie Lewis. Mrs. Moncravie also stated that her personal property, money

market accounts and other bank accounts were held in joint tenancy with her son and were to go to him as the surviving joint tenant, and that she wished the remainder of her estate to become her son's sole property .

After the death of John Moncravie, Sr., Annette Gore stayed with and cared for her mother for a number of weeks. During that time Mrs. Gore drove Mrs. Moncravie to Tulsa where her mother executed a new will dated July 8, 1987, and a power of attorney in favor of Mrs. Gore. Under the terms of that will, Mrs. Moncravie's headright interests and bank accounts were to be divided with Mrs. Gore designated to receive a 1/2 interest, and the four children of John Moncravie, Sr., designated to share equally the other 1/2

interest. Mrs. Gore was to receive a life estate in her real property with remainder interest in the five grandchildren, and Mrs. Gore was named as the executrix. On July 10, 1987, Annette Gore had the title to Mrs. Moncravie's certificates of deposit changed from joint tenancy with John T. Moncravie, Sr. to joint tenancy with rights of survivorship in Mrs. Gore. The changes in the certificates of deposit were made without the knowledge or approval of Mrs. Moncravie. Mrs. Gore, who lived in Denver, Colorado, attempted to get Mrs. Moncravie to move to Colorado but Mrs. Moncravie refused. There was testimony that the mother and daughter quarreled before Mrs. Gore left late in the month of July. Mrs. Gore visited her mother one other time, in September 1987,

before her mother's death. At that time Mrs. Gore learned that her mother had established a trust but Mrs. Gore was unable to learn the terms of the trust at that time. During September 1987, Mrs. Gore was also informed that her power of attorney had been revoked.

Some time in August 1987, Mrs. Moncravie learned of the changes to the certificates of deposit. At that time she went to the Bank and changed the certificates of deposit and accounts to her name alone. She also asked for assistance in having Mrs. Gore's power of attorney revoked. The Bank officers spoke to her about establishing a trust. Although she did not do so immediately, she eventually asked to have the trust and a will drawn for her. The trust document was executed on August

25, 1987, but the will was not executed until November 3, 1987. The will was prepared by an attorney associated with the First National Bank of Berryville and witnessed by Jim Harp and Beckie Mallett. Mr. Harp testified at the hearing on February 22, 1989, and Ms. Mallett's deposition was submitted into evidence. The relevant portions of the will are as follows:

> I am a widow, and I have two (2) children, namely, JOHN T. MONCRAVIE, SR., who is deceased, and ANNETTE GORE. I have no other children and no adopted children.

ARTICLE IV

DISPOSITION OF OSAGE

HEADRIGHT OR MINERAL INTEREST

> I hereby direct my Executor named herein, upon my death, to dispose of my Osage Headright or

Mineral Interest as follows:

A) I hereby give and bequeath to my grandson, JOHN THOMAS MONCRAVIE, JR., an undivided one-half(1/2) of my Osage Headright or Mineral Interest ln fee simple title.

B) I hereby give and bequeath to my qranddaughter, MARY KATHRYN LEWIS, an undivided one-half (1/2) of my Osage Headright or Mineral Interest in fee simple title....

ARTICLE V

DISTRIBUTION OF RESIDUARY ESTATE

The rest, residue and remainder of my Estate which I define as all real and personal property, wherever and whenever acquired by me in which I have any interest at the time of my death, including property in which I have a reversionary interest or interest in any option to purchase, and all property which is not otherwise effectively disposed of under this Will I hereby give to the MYRTLE C. MONCRAVIE REVOCABLE TRUST,DATED AUGUST 25,1987, FIRST NATIONAL BANK OF BERRYVILLE, ARKANSAS, Trustee.

The relevant terms of the Myrtle C.

Moncravie Revocable Trust provided as follows:

ARTICLE IV

DISPOSITION OF THE TRUST

ESTATE AT SETTLOR'S DEATH

> B) Upon the death of the Settlor, the Trustee shall distribute all of the Trust Estate, including principal and accumulated income as follows:
>
> 1) One-fourth to JOHN T. MONCRAVIE, JR. One-fourth to MARY KATHRYN LEWIS. One-fourth to CLEMENTINE S.MONCRAVIE. One-fourth to CHRIS ALEC MONCRAVIE. The above named persons being the living children of JOHN T. MONCRAVIE, SR., the Settlor's deceased son,and living grandchildren of the Settlor. . .
>
> 2) The Settlor hereby acknowledges that she has one (1) living daughter, namely, ANNETTE GORE, who is not provided for in the distribution of the Trust assets as set out in the immediate preceding paragraph. Settlor hereby states by entering into this Trust Agreement that it is her specific intention to exclude her daughter, ANNETTE GORE, or any of

ANNETTE GORE'S descendants or heirs, from sharing in the distribution of the Trust Estate.

FIRST ISSUE

The Determination of Testamentary Capacity And Lack of Undue Influence Not against Weight of Evidence.

Mrs. Gore filed a notice of intent to appeal, alleging error in the second and third conclusions of law, which state that decedent had testamentary capacity and that the will was not the result of undue influence. Although Mrs. Gore did not address these issues in her Answer Brief, we find that the regulations require only that the party mail a notice of intent to appeal to the Secretary of the Interior and perfect the appeal by also mailing the notice to the Superintendent and upon the opposing counsel or litigants. 25 C.F.R. §

17.14. The regulations further provide that the party taking an appeal "may" file a brief or other written statement of his contentions and opposing counsel or litigants may then file an answer. Since no brief was submitted on the questions of testamentary capacity and undue influence, the Secretary must examine the Superintendent's decision on the administrative record alone.

A. Finding of Testamentary Capacity

At the hearings Mrs. Gore alleged that her mother lacked the testamentary capacity to execute a will because she was suffering from the insane delusion that Mrs. Gore was attempting to exercise control over her mother. In his recommendation to the superintendent, the Special Attorney cited Akers v. Hodel, No. 86-2898 (10th Cir.,

March 24, 1989), in which the court stated that an insane delusion can be found only when the belief is (1) false, (2) irrational, and (3) explainable only as the product of mental disorder.

The Special Attorney found evidence to support Mrs. Moncravie's belief that Mrs. Gore was attempting to exercise control over her mother both in (1) Mrs. Gore's adding her own name to her mother's certificates of deposit without her mother's knowledge or permission; and (2) in Mrs. Gore's insistence on Mrs. Moncravie's moving to Colorado where Mrs. Gore lived even though Mrs. Moncravie did not want to leave her bome ln Arkansas. In his deposition Mrs. Moncrave's physiclan, Dr. Dan Bell, stated:

> Annette Gore, her daughter, was close and assisted, but appar-

ently left in a huff shortly [] after John's death. But she was very actively involved for a period of time, too, but I understand there was some disagreement between Annette and Myrtle Moncravie. Annette wanted to move Myrtle to Denver where she could live with her; she could care for her in her apartment there, and Myrtle didn't want to leave. There was a spat over that and Annette left abruptly and was not seen again in the home, even though I talked to her on the phone... [I]t was just a problem with Annette trying to exercise control over where Myrtle lived and her estate, and Myrtle did not want to lose that control. Myrtle perceived that as Annette trying to take control of her life and domineer her. Whether it was true care and concern or not,it's hard to say. But it's my opinion that Annette had Myrtle's interest at heart and it was just miscommunicated, and it ended up alienating Myrtle toward the end. So they had a falling out over an inappropriate level of care."

(Bell Depositon pp. 8, 11 & 12)

Although Dr. Bell believed Mrs. Moncravie may have over-reacted to Mrs. Gore's actions, he testified that he believed Mrs. Moncravie was competent to make a will. (Bell Deposition, pp. 30-31) Mr. Atchley, the attorney who prepared Mrs. Moncravie's revocable trust agreement and the November 1987 will, also testified that he believed Mrs. Moncravie possessed testamentary capacity on both August 25, 1987, and on November 3, 1987. Mrs. Gore failed to introduce any evidence to show that Mrs. Moncravie's belief was irrational or explainable only as the product of a mental disorder.

The standard of proof regarding tbe testamentary capacity of the Testatrix is preponderance of the evidence. In the Matter of the Will of Omer Louis Jefferson, Jr.,

Unallotted Osage, Deceased, No. 90-C-628-B (N.D. Okla., Interim Order, Aug.1, 1991), citing American National Red Cross v. Gumberts, 247 P.2d 735 (1952), and Duckwall v. Lawson, 172 P.2d 415 (1946). Although the record in this case reveals some evidence to support the theory that Mrs. Moncravie misunderstood her daugh-ter's motives, there is overwhelming evidence that Mrs. Moncravie beliefs were based in fact and were not irrational or insane. I find that the Superintendent did not err in determining Mrs. Moncravie possessed testamentary capacity.

B. Finding of No Undue Influence

At the hearings, Mrs. Gore also asserted that the November 1987 will was invalid because Mrs. Moncravie was acting under undue influence when she executed the

document. It is unclear whether Mrs. Gore believed that Mrs. Moncravie was unduly influenced by her grandson, John Moneravie, Jr., a principal legatee under the will, or the Bank which would benefit from the administration of Mrs. Moncravie's revocable trust. However, in neither case did the superintendent find evidence of influence which would have destroyed the Testatrix's free agency, Matter of Estate of Samochee, 542 P.2d 498 (Okla. 1975), or of influence that was substituted for that of the Testatrix at the time the will was executed, In re Foley's Estate, 531 P.2d 1075 (Okla. 1974).

Both Mrs. Gore and John Moncravie, Jr., testified that Mrs. Moncravie was extremely strong willed and that she knew

what she wanted and did not appreciate interference. The Superintendent's finding that Mrs. Moncravie was not acting under undue influence when she executed the November 3, 1987, will was supported by the clear weight of the evidence and is affirmed.

SECOND ISSUE

The Will Was Sufficiently Published and Met Requisites of Subscription under Oklahoma Law

The Superintendent found that Mrs. Moncravie's will dated November 1987 was invalid under Oklahoma law because the testatrix did not sufficiently publish to the witnesses that the document before her was her last will and testament pursuant to 84 Okla. Stat. § 55. The Special Attor-

ney had previously advised the Superintendent that it was his opinion that Price v. Price, 479 P.2d 952 (Okla. 1971) dictated such a result based upon the circumstances surrounding the execution of the will.

In Price the testator, who was suffering from Parkinson's disease, had his youngest son and chief beneficiary prepare the will. The son read the will to his father in the presence of his father's nurse, who was one of the witnesses to the will. However, the second witness was not present when the will was read. The testator did not ask the second witness to sign his will nor did the testator acknowledge that he knew the document to be his will. The son asked the testator, "Dad, is this the way you want this to be?" The testator

expressed assent, signed his name, and then pushed the paper to the second witness indicating that the second witness should also sign. After the document was signed, the testator handed the will to the son and said, "Use this if you have to." The court found "the testator's intelligent acquiescence" was insufficient publication under the Oklahoma statute without some mention of the word "will" or some reference to the nature or effect of the document. Id.

The Superintendent found Price to be dispositive of the present case. Although Russell Atchley, the attorney who prepared the will for Mrs. Moncravie, read and explained the will to her in the presence of William Hudspeth, the trust officer of the Bank, Mr. Hudspeth was not an attest-

ing witness. The attesting witnesses were not present during the reading of the will. Further, it was unclear from the testimony whether the word "will" was used by any party in the presence of the witnesses. The attorney testified that he said, "'All right, Mrs. Moncravie, the witnesses are here, . . . if this is the way you want it and you are satisfied with it now is the time to sign it.'" (Tr. pp. 137) Mrs. Moncravie straight-en[ed] up like she was ready to sign" and then signed in the presence of the witnesses. The Superintendent found Mrs. Moncravie's gesture of straightening up and then signing was not sufficient under Price to satisfy the requirement of publication.

Although the Superintendent's argument is

persuasive under 84 Okla. Stat.§ 55, the Secretary finds the Superintendent was in error in his determination of which Oklahoma statute applied. See In the Matter of the Will of Margaret Lessert Forney, Unallotted Osage, Deceased, No. IA-T-50 (March 21, 1991); see also 84 Okla. Stat. § 71. Although the federal statutory scheme requires wills distributing Osage headright interests and/or other restricted properties be "executed in accordance with" Oklahoma law, Act of October 21, 1978, Section 5(a), 92 Stat. 1660, 1662, Mrs. Moncravie's will was drafted and executed in Arkansas where she was a resident at the time of execution. Therefore, the execution of her will would be governed by the Oklahoma Statute, 84 Okla. Stat. § 71 which states that any

will made in a foreign state is valid in Oklahoma when executed according to the law of the place where the will was made. The validity of Mrs. Moncravie's will dated November 3, 1987, then rests upon its compliance with Ark. Stat. Ann. § 28-25-103 which provides:

> Execution generally.
> (a) The execution of a will, other than holographic, must be by the signature of the testator and of at least two (2) witnesses .
> (b) The testator shall declare to the attesting witnesses that the instrument is his will and either:
> (1) Himself sign; or
> (2) Acknowledge his signature already made; or
> (3) Sign by mark, his name being written near it and witnessed by a person who writes his own name as witness to the signature; or
> (4) At his discretion and in his presence have someone else sign his name for him. The person so signing shall write his own

name and state that he signed the testator's name at the request of the testator; and

(5) In any of the above cases, the signature must be at the end of the instrument and the act must be done in the presence of two (2) or more attesting witnesses.

(c) The attesting witnesses must sign at the request and in the presence of the testator.

Arkansas courts have interpreted the publication requirement very liberally. As early as 1853 the Arkansas courts rejected strict compliance with the statutory requirement of publication. The court said no particular form of words was required for publication of a will. "The fact of publication . . .is to be inferred or not, from all the circumstances attending the execution of the will; all that is said and done as part of the res

gestae." Rogers v. Diamond, 13 Ark. 474, 8 Eng. 474 (1853), cited in Faith v. Singleton, 692 S.W.2d 239, 242-43 (Ark. 1985).

In Hollingsworth v. Hollingsworth, 401 S.W.2d 555 (Ark. 1966), the court found legally sufficient publication when the testator signed the document in the presence of two witnesses even though the witnesses were unable to say whether the testator actually said the document was his will or whether he literally requested them to sign it as witnesses. The courts even found publication sufficient when the testatrix, who was facing surgery, requested a document be drawn to insure that her property would go to a particular person even though the testatrix denied that the document was

a will. Faith v. Singleton, 692 S.W.2d 239 (Ark. 1985). And in Green v. Holland, 657 S.W.2d 572 (Ark. Ct. App. 1983), the court said a testator could acknowledge his signature by acts and gestures without expressing it in words, and publication could be inferred from all of the circumstances attending the execution of the will:

> The requirements for establishing an attested will must be read together and construed to permit establishment of the will by any legally admissible evidence or requisite facts in order that the testatrix's wishes may not be thwarted by straightlaced construction of statutory language where there is no indication of fraud, deception, imposition or undue influence.

Id. at 578. In the present case, it was not clear from the testimony whether the word "will" was ever used by anyone speak-

ing to Mrs. Moncravie or the witnesses. Mrs. Moncravie did not refer to the document as her "will" in the presence of the witnesses. Mr. Atchley's words to Mrs. Moncravie in the presence of the attesting witnesses did not indicate that the document was a will, nor did Mrs. Moncravie's gesture signal her understanding that the document was her will. However, an examination of the surrounding circumstances, as permitted under Arkansas law, mandates the conclusion that Mrs. Moncravie knew the document she signed was her will and the witnesses also knew the document they were signing was a will. Jim Harp stated that he thought Mr. Atchley mentioned the term "will" (Tr. pp. 11 & 12), and Beckie Mallett said she understood tbe document she signed to be

Mrs. Moncravie's will. (Tr. pp. 45 & 46.) It is clear from the record that Mrs. Moncravie asked her grandson to drive her to the Bank In November 1987 so that she might execute her will.

Further the record reflects the will to be part of a scheme of estate work contemplated and completed by the Testatrix over a two month time period, beginning on August 10, 1987, when Mrs. Moncravie changed the names on the certificates of deposit, continuing on Auqust 25, 1987, with the execution of the revocable trust document and culminating on November 3, 1987, with the execution of the will. It is also clear that Mr. Atchley read the will to her word for word and explained each article in layman terms before she signed the document. Consider-

ing all the circumstances attending the execution of the will, it is clear that the testatrix understood the document she was signing was her will and publication can be inferred under the Arkansas Standard. Green v. Holland, 657 S.W.2d 572 (Ark. Ct. App. 1983). Accordingly I find that the Superintendent was in error in his determination that the execution of the will of November 3, 1987, was insufficient under Oklahoma law.

CONCLUSION

THEREFORE, IT IS ORDERED that the last will and testament dated November 3, 1987, of Myrtle C. Moncravie, Osage Allottee No. 917, deceased, is, hereby APPROVED.

/s/ M. Sharon Blackwell

Acting Regional Solicitor

Dated this fourth day of December, 1991.

UNITED STATES DEPARTMENT
OF THE INTERIOR

IN THE MATTER OF THE WILL	)	
	)	
	)	
OF	)	HEARING
	)	NO. H-88-138
	)	
MYRTLE C. MONCRAVIE, OSAGE ALLOTTEE NO. 917, DECEASED	)	

ORDER APPROVING WILL

Pursuant to Section 8 of the Act of April 18, 1912, 37 Stat. 86, 88 (1912 Act), as amended by Section 5(a) of the Act of October 21, 1978, 92 Stat. 1660, 1661 (1978 Act), and in accordance with regulations promulgated and published by the Secretary of the Interior at 25 C.F.R. Secs. 17.1-17.14, hearings were conducted by the designated Special Attorney for the Osage Indians to determine the validity of

the will dated November 3, 1947, of Myrtle C. Moncravie, Osage Allottee No. 917, deceased. Following presentation of testimony and other evidence, the Special Attorney prepared the Record of the case and submitted his recommendation (copy attached) in conformity with 25 C.F.R. Sec. 17.10. The Superintendent of the Osage Agency, having reviewed the Record and the written transcription of testimony herein and considered the recommendation of the Special Attorney, (copy enclosed) finds as follows:

I. Findings of Fact

1. THAT Testatrix died on June 5, 1988, at the age of 92, a resident of Eureka Springs, Arkansas;

2. THAT Testatrix was an Osage Indian who, at the time of her death,

owned property subject to the jurisdiction of the Superintendent, consisting of 1.16666 Osage headright interest and cash;

3. THAT at the time of Testatrix's death, she was survived by her daughter, Annette Gore, and her grandchildren, Mary K. Lewis, Clementine Moncravie, Chris A. Moncravie and John T. Moncravie, Jr., being children of a son, John Thomas Moncravie, Sr., who predeceased the Testatrix, all of whom are of Osage Indian blood and constitute her heirs under provisions of the Oklahoma law of intestate succession;

4. THAT at the time of Testatrix's death, a will executed November 3, 1987, named John T. Moncravie, Jr., and Mary Kathryn Lewis as beneficiaries of her Osage headright interest;

5. THAT notice of hearing on the petition for approval of said will was given to all interested parties by mail as required by 25 C.F.R. Sec. 17.4 and by publication as required by the 1978 Act; and that proof of such notices has been incorporated into the Record of the case;

6. THAT on November 18, 1988, and February 22, 1989, in Pawhuska, Oklahoma, hearings were held before the Special Attorney; that testimony was taken and depositions and other evidence introduced at those hearings; and that thereafter the Special Attorney prepared the record of the case in conformity with 25 C.F.R. Sec. 17.10 and recommended that the will be disapproved.

The Superintendent further finds as follows:

II. Conclusions of Law

1. THAT all wills executed by Osage Indians involving the disposition of restricted property must be approved by the Superintendent, pursuant to Section 8 of the 1912 Act, as amended by Section 5(a) of the 1978 Act, and 25 C.F.R. Sec. 17;

2. THAT evidence shows that, at the time of the execution of the will, Testatrix possessed testamentary capacity, as defined by the laws of the State of Oklahoma, in that she knew, in a general way, the character and extent of her property, understood her relationship to the objects of her bounty and those who ought to be in her mind at the time she made her will; and comprehended the nature and effect of her testamentary act;

3. THAT there is no evidence that the will was executed as a result of menace, fraud, duress, coercion, or undue influence being exerted upon the Testatrix;

4. THAT the will dated November 3, 1987, does not meet the requirements of the laws of the State of Oklahoma for a valid will for the reason that the statement "if this is the way you want it and you are satisfied with it, now is the time to sign it," coupled with the "Testatrix straightening up like she was ready to sign" does not constitute a sufficient declaration by testatrix to the witnesses that the instrument being signed was her will.

IT IS ORDERED THAT the last will and testament dated November 3, 1987,

of Myrtle C. Moncravie, Osage Allottee No. 917, deceased, be and the same is, hereby DISAPPROVED.

This Order is final unless an appeal is filed pursuantto 25 C.F.R. Sec. 17.14.

Dated this 4th day of October, 1989, at Pawhuska, Oklahoma.

/s/ Jack Shoemate

SUPERINTENDENT, OSAGE AGENCY